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JAMES H. McKENNEY,
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In the Supreme Court of the United States.

No. 145.

OCTOBER TERM, 1902.

GUSTAVUS LEACH, ET AL

vs.

CHARLES R. BURR, EXECUTOR, ET AL.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

R. B. BEHREND,
J. J. DARLINGTON,
Attorneys for Defendants in Error.

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At the hearing of this case, Sec. 1625 of the Code of Laws for the District of Columbia, providing that no will shall be good or effectual unless the person making the same be of sound and disposing mind and capable of executing a valid deed or contract, was referred to as bearing upon the question of the burden of proof, where the issue is as to the testamentary capacity of a testator. This provision of the Code is identical in phraseology with the Maryland Act of 1798, Ch. 101, cl. III. Sec. 3, in force in the District of Columbia since its creation, and which provides:

"No will, testament or codicil shall be good and effectual for any purpose whatever, unless the person making the same be, at the time of executing or acknowledging it as hereafter directed, of sound and disposing mind, and capable of executing a valid deed or contract."

Under this provision, the courts of Maryland have always held that the sanity of a testator is to be presumed until the contrary is shown, and that the burden of proof is upon the caveators. Higgins *vs.* Carlton, 28 Md. 115, 143. And in Tyson *vs.* Tyson, 37 Md., 567, 582, the action of the trial court was sustained in directing a verdict in favor of the will, upon issues identical with those in the case at bar, on the ground that the evidence, although much more nearly approaching a *prima facie* case than the evidence in the present instance, was not sufficient "to warrant the jury, in the exercise of a reasonable intelligence, to find any issues in favor of the plaintiffs."

In the District of Columbia, also, the like rule as to the burden of proof was declared as far back as the year 1807 (Dunlap *vs.* Peter, 1 Cr. C. C., 403), and has ever since been followed.

In the present case, however, the question as to the burden of proof is probably not material, since the caveators' witnesses Fairbanks, Cushing and Stevenson all testified that the testator was of sound mind, and no evidence to the contrary was given.

Respectfully submitted,

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